2002

Robert C. Shipman; Kathleen M. Rollman; Dale Sweat on behalf of West Jordan City v. Donna Evans, Andrew Allison, Lyle Summers, Carolyn Nelson : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

ROBERT C. SHIPMAN; KATHLEEN M. ROLLMAN; DALE SWEAT, Individually And For And On Behalf Of WEST JORDAN CITY, Plaintiffs / Appellants, v. DONNA EVANS, Mayor of West Jordan City; DONNA EVANS, an individual; ANDREW ALLISION, West Jordan City Council Member; ANDREW ALLISON, an individual; LYLE SUMMERS, West Jordan City Council Member; LYLE SUMMERS, an individual; CAROLYN NELSON, West Jordan City Council Member; CAROLYN NELSON, an individual. Defendants / Appellees.	Case No. 20020103-SC

REPLY OF APPELLANTS ROBERT C. SHIPMAN; KATHLEEN M. ROLLMAN; DALE SWEAT, INDIVIDUALLY AND FOR AND ON BEHALF OF WEST JORDAN CITY

On appeal from the final judgment of the Third Judicial District Court for Salt Lake County, Sandy Department, Honorable Denise Lindberg, District Judge

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In the words of John Adams, "***Facts are stubborn things***, and whatever may be our wishes, our inclinations, or the dictums of our passions, they cannot alter the state of facts and evidence." *Legal Papers of John Adams*, III, 269 (quoted in, *John Adams*, David McCullough, page 68) (emphasis added). The following represents just some of the more glaring material misstatements of fact in Defendants/Appellees' Brief, hereafter "DAB".

1. Defendants try to legitimize their unlawful conduct by representing themselves to this Court as "the City" throughout Defendants' Brief. And, despite Donna Evans having been resoundingly voted out of office last year, Defendants further disingenuously represent to this Court that "Defendants/Appellees also officially represent the City of West Jordan." (DAB, List of Parties).

The stubborn facts: Plaintiffs sued only four renegade city council members, Donna Evans, Andrew Allison, Lyle Summers and Carolyn Nelson, and *not* "the City," as clearly reflected on the cover page of Defendants/Appellees' Brief.

Directly contrary to Defendants holding themselves out as "the City," Defendants' own caption to this action clearly reflects that *Plaintiffs* (not Defendants) brought this action **"For And On Behalf of WEST JORDAN CITY"** against Defendants. Plaintiffs brought this action "for and on behalf of West Jordan City" because the City Attorney, failed and refused to take any remedial action, even after acknowledging to dissenting City Councilmember,

Natalie Argyle, that Defendants' actions in purporting to change the General Plan were unlawful.[1]

2. Defendants try to trivialize the egregiousness of their unlawful conduct in denying Plaintiffs an opportunity to present the Parks and Rec Plan at the May 1, 2001 public hearing by straining the bounds of truth with the following: "In actuality, there was *little difference* between the DAT Plan and the Parks and Recreation Plan." (DAB at 8).

The stubborn facts: Defendants were the principal proponents for the DAT Plan which sought the disposal of public park lands for a monstrous private "mixed-use" commercial and residential development.[2] The Parks and Recreation Plan sought to preserve and protect the parklands of West Jordan and allowed only for a limited amount of commercial activity as a direct amenity for park patrons, such as park concessions.[3] *Little difference??*

3. Defendants further seek to rationalize their unlawful conduct by shamelessly representing to this Court that "There was substantial public debate regarding the DAT Plan and the Parks and Rec Plans." (DAB at 9).

The stubborn facts: Then-mayor, Donna Evans, upon request by Plaintiff's counsel, refused to permit the Parks and Recreation Committee to present their

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[1] Addenda **Exhibit N, at paras. 17-18**
[2] Addenda **Exhibits J, K, L at paras. 8-9**, and **Exhibits O, P, Q at para. 10**
[3] Addenda **Exhibits J, K, L at para. 7**, and **Exhibits O, P, Q at paras 8-9**

plan at the May 1, 2001, public hearing.[4] The mandatory provisions of West Jordan Unified Development Code 10-1-201(e) and UCA 10-9-303 require that the city council ***shall*** notice and ***shall*** hold a public hearing on *the* recommendation forwarded to it by the Planning Commission, i.e. the Parks and Rec Plan.[5] Further, when Plaintiff's counsel at the May 1, 2001 public hearing referred to such legal requirements mandating a public hearing on the Parks and Rec Plan, and asked repeatedly why Defendants would not permit a presentation and public hearing on the Parks and Rec Plan as required by law, Donna Evans and the other Defendants repeatedly refused Plaintiffs any answer.[6]

Moreover, Defendants even went so far as to defeat a specific motion brought to allow the Parks and Rec Committee to present their plan at the public hearing, i.e. Defendants defeated a motion to follow the law.[7] The dozen citizens

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[4] Addenda **Exhibits J, K, L at paras. 13-15**, and **Exhibits O, P, Q at paras. 11-15**, and R. 196-98

[5] Addenda **Exhibits J, K, L at para. 7**, and **Exhibits O, P, Q at paras. 7-9**

[6] Addenda **Exhibits J, K, L at para. 14**, and **Exhibits O, P, Q at para. 13**, and R. 196-98. (R. 199, line 19 - 45, "Frank Armbruster, 8877 Sout 2700 West. Why won't you answer that man's question? Mayor: I asked and answered , and . . . frankly, this time is not for debate. It's for you to make comments. If you have any other comments, please make your comments. Armbruster: I just asked, 'why you won't answer that man's question?' referring to Plaintiffs' counsel. Now I'm here with those people, and I Just came with my body. But I am very curious why you can sit up there and say we're going to threaten to clear this room. Where the hell do you think you are? The Soviet Union's gone. The question before you is, why won't you answer that man's question? And you denying me an answer. . . . I, for one, don't know what he's going to say. Apparently, you guys know what he's going to say. What's he going to say? Is there some reason that we want to silence him?")

[7] Addenda **Exhibits O, P, Q at para. 15**, R. 800 at page 40, and R. 143.

that "expressed their views regarding both the DAT Plan and the Parks and Rec plans" (DAB at 9) also inquired of Defendants why they would not permit the Parks and Rec Committee to present their Plan, also without relief or reply from Defendants.[8]

When Plaintiff's counsel refused to yield the podium after three minutes[9] without receiving any explanation why Defendants would not permit the the Parks and Rec Committee to present their plan as required by law, Defendant Donna Evans, with the acquiescence of the other Defendants, had Plaintiff's counsel removed by police officers from the public hearing in further violation of law.[10] So much for *"substantial public debate."*

4. In order to have any basis for opposing Plaintiffs' private attorney general claim, Defendants posit the complete falsehood that "In this case, a judgment was not rendered in Plaintiffs' favor. In fact, each and every cause of action was dismissed. Nor was there even a procedural victory for Plaintiffs. Each and every motion filed by Plaintiffs was denied." (DAB at 15)

The *stubborn facts* are self-evident in Defendants/Appellees' own Brief. "Because the contempt hearing in this mater was initiated at the District Court's request, and to vindicate its own authority, the District Court correctly applied the

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[8] R. 126-27, 199-205, 214-24.

[9] R. 197 (Defendants set this time limit in specific contemplation of this public hearing)

[10] UCA 10-3-608 requires a motion and a 2/3 vote to remove someone from a public hearing. R. 216-17 reflects the comments of Plaintiffs'counsel at the May 1,

criminal standard of review to the Order to Show Cause hearing." (DAB at 12). What "authority" did the District Court need to "vindicate" by ordering the Defendants to show cause why they should not be held in contempt of court? Clearly, the District Court issued its Order and Stipluation Regarding Plaintiffs' Motion for Temporary Restraining Order (**Exhibit A**) enjoining Defendants "from taking any binding action in furtherance of the [unlawful] Plan Amendment." Defendants acknowledge in their Brief that an order which sustains a claim for attorney's fees under the private attorney general doctrine includes both "a judgment or a *court ordered consent decree approving a settlement.*" (DAB at 17).

However, Defendants absurdly assert that the **Order and Stipulation Regarding Plaintiffs' Motion for Temporary Restraining Order** (R. 332-334, See also R. 299-300 original minute entry and order) and the **Amended Order and Stipulation Regarding Plaintiffs' Motion for Temporary Restraining Order, Exhibit A**, issued upon Plaintiffs' application for temporary restraining order, are somehow not orders even though they clearly "legally mandate modifications of behavior brought about as a direct result of the suit." (DAB at 17). Again, the *stubborn facts* reveal that Defendants' assertions of fact in this regard are just simply and patently false.

2001 public hearing and Defendants refusing to answer specific points of legal procedure, and their removing forcibly Plaintiffs' counsel from the public hearing.

5. Defendants claim that it was because of a newly passed Citizen's Initiative that, "Accordingly, on November 13, 2001, the City passed Ordinance No. 01-56, which repealed the Plan Amendment" and that "Plaintiffs cannot show that 'but for' their action, the Plan Amendment was repealed." (DAB at 11).

Yet again, the stubborn facts: **Exhibit I to the Addenda** to Plaintiffs/Appellants' Brief includes both the Request for Council Action and the City Council Meeting Minutes, dated November 13, 2001 regarding Ordinance 01-56. The discussion reflected in the City Council Minutes reads in its entirety as follows:

> "Kevin Watkins [City Attorney] said on May 1, 2001, the City Council, by Ordinance, amended the City of West Jordan General Plan. *This action was now the subject of a lawsuit filed by member of the Parks and Recreation Committee, and was now pending in District Court*. ***Repealing this action would eliminate the need for further litigation about this issue by rendering it moot.***" (emphasis added).

Whereupon a motion was presented and passed repealing Defendants' unlawful Plan Amendment of May 1, 2001.

Defendants' own official City documents directly contradict Defendants' shameful representations to this Court that Defendants did not repeal their unlawful Plan Amendment "but for" Plaintiffs' lawsuit. *Stubborn facts!* Plaintiffs/Appellants submit that Rule 11 sanctions are warranted against Defendants in this matter.

6. With respect to Defendants' having awarded a contract regarding the Sugar Factory Property in contempt of the District Court's Order and Stipulation

Regarding Plaintiffs' Motion for Temporary Restraining Order (**Exhibit A**) enjoining Defendants' "from taking any binding action in furtherance of the Plan Amendment,"[11] Defendants unabashedly represent to this Court that (i) "the undisputed evidence in this case shows that *the disputed contract was never entered into with French*" (DAB at 32); (ii) "In late October, well after the City had first authorized the agreement with French, *which ultimately was not entered into*, the Stipulation was amended" (DAB at 10); (iii) "Even under the amended Stipulation, no notice was required because *no contract was awarded*" (DAB at 10); and "even if the civil standard [of contempt] should have been applied, the Plaintiffs are without remedy *since no contract was awarded* and the Plaintiffs were not injured." (DAB at 12)(emphasis added).

The stubborn facts: **Exhibit H of the Addenda** to Plaintiffs/Appellants' Brief is the ***fully executed*** Agreement for Professional Consulting Services, Main City Park Master Plan between French & Associates and the City of West Jordan. This Agreement was expressly for "binding action in furtherance of the Plan Amendment" contrary to the District Court's Order and Stipulation (**Exhibit A**). Specifically, this Agreement provided for the commercial development design of the Sugar Factor Property in furtherance of the unlawful May 1, 2001 DAT Plan Amendment for the sum of $40,000. The Agreement was signed by then-mayor Donna Evans on August 9, 2001 and by French on July 20, 2001. At Defendants' Contempt Hearing, Defendants stated that this Agreement was not *really* an

[11] DB at 9; See also R. 357-58, R. 800, Page 104-1063

agreement because staff, employing some inexplicable veto power over the City Council, "determined that the Agreement would not be necessary." (R.688-90). In other words, Defendants did everything they could to violate the District Court's Order and Stipulation (**Exhibit A**) enjoining Defendants "from taking any binding action in furtherance of the [unlawful] Plan Amendment" including "awarding" and actually entering into a contract for the same.

How Defendants can represent to this Court that "the undisputed evidence in this case shows that the disputed contract was never entered into with French" is a complete mystery! This is just blatantly false!

7. In an attempt to excuse the District Court's erroneous *sua sponte* dismissal of Plaintiffs' private attorney general claim at the very initial stages of this lawsuit, Defendants assert that "The fact is, the issue of Plaintiffs' entitlement to attorney's fees was fully briefed and argued, and was addressed by the District Court on more than one occasion." (DAB at 13).

The stubborn facts: Defendants admit in the very next sentence that the *stubborn facts* are that "It is true that the District Court initially dismissed the attorney's fees claim *without being moved by [Defendants]*." (DAB at 13)(emphasis added). In other words, the District Court admittedly dismissed Plaintiffs' private attorney general claims *sua sponte*. There after the court summarily denied, without notice or hearing, two motions[12] by Plaintiff to

[12] The District Court denied Plaintiffs' first motion to reconsider without a hearing and without any findings of fact or conclusions of law. And, at Defendants'

reconsider the *sua sponte* dismissal and to permit Plaintiffs to adduce and present evidence, such as that contained in **Exhibit I.** The only other hearing in this matter besides Plaintiffs' initial TRO hearing was Defendants' Contempt hearing which was notice only for the purpose of Defendants showing cause why they should not be held in contempt.[13] The *stubborn facts* reveal that, in Defendants' world, due process means summarily denying a request to reconsider a prior *sua sponte* denial of due process.

8. After successfully preventing Plaintiffs' from conducting any discovery in this case, Defendants assert that "Plaintiffs have not shown, however, that these public policies [the attempted unlawful disposition of public park property and disregard of the public hearing process regarding the same] rise to the level contemplated by the private attorney general exception." (DAB at 19).

The stubborn facts: Even without ever being given the opportunity to adduce and present evidence (i.e. a "showing" as Defendants request), it is plainly self-evident that the disposition of public park property and the proper notice and public hearings regarding the same are matters of important public policy.

Contempt Hearing on November 28, 2001, without notice or hearing on Plaintiffs' private attorney general claim, the District did address Plaintiffs' claim without permitting Plaintiffs to adduce evidence, without notice of hearing the private attorney general claim or opportunity to present meaningful argument. As set forth in *Robinson v. City Court for City of Ogden,* 185 P.2d, 256, 258 (Utah 1947), a contempt hearing is to be "separate and apart from the principle action."

[13] R. Notice of Contempt Hearing. As noted in *Robinson v. City Court for City of Ogden,* 185 P.2d, 256, 258 (Utah 1947) "A contempt proceeding is separate and apart from the principle action." It was plain error for the District to entertain and

Plaintiffs have further shown that these matters are of great public importance through the Affidavits of dissenting City Council Members Natalie Argyle, Gordon Haight, and Brian Pitts, and Park Committee officers and members, all expressly attesting to the fact that protecting West Jordan's parklands and enjoining Defendants from violating all manner of laws to do so is a matter of important public policy. **(Exhibits J, K, L at 30-31, and O, P, Q at 24-25)**.

9. In an attempt to support District Court summary dismissal of Plaintiffs' claims for declaratory relief asserting that the issue is now moot, Defendants represent that "No ordinance currently portends to dispose of park property." (DAB at 23).

The stubborn fact is that in March of 2002, and in disregard of the newly passed Citizens's Initiative which requires the consent of a majority of the citizens of West Jordan,[14] the City of West Jordan approved a contract for the private development of this same Sugar Factory Park land for low-income senior housing (**Exhibit T** attached hereto). Prior to the City Council action, this Sugar Factory Property was purchased for, zoned, and master planned for park and recreational uses.[15] The City Council awarded the contract for the private low-income senior housing before changing the zoning or general plan and without ever providing

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decide oral motions without notice and an opportunity for Plaintiffs to be adequately heard on such matters.

[14] DB Brief at 10-11.

[15] R. 581-585

notice or holding a public hearing to vacate the park use of the property as required under UCA 10-8-8.[16]

However, because Plaintiffs' claim for declaratory relief was summarily dismissed in the very initial stages of the action, without Plaintiffs ever being afforded the opportunity to adduce and present such evidence, this matter is not part of the present record, but is a matter of public record with the City of West Jordan. **(Exhibit T)**.

In conclusion, Defendants/Appellees' Brief is riddled with unsupported and unsupportable allusions to material matters that are directly at odds with the *stubborn facts* before this Court. As a result, Defendants' legal analysis based on plainly false statements of material fact is fatally flawed.

ARGUMENT

I. PLAINTIFFS ARE ENTITLED TO ATTORNEY'S FEES UNDER THE PRIVATE ATTORNEY GENERAL DOCTRINE.

A. Defendants' Provide No Authority For Their Proposition That The District Did Not Commit Procedural Error In Dismissing *Sua Sponte* Plaintiffs' Private Attorney General Claim For Relief.

[16] There is an unquestioned departure from the elementary principle that property cannot be taken without due process of law and just compensation, where, without notice, petition, or hearing, a city, by ordinance, closes a portion of a street and alley abutting on school board-owned property on both sides and used for vehicular travel, and thus creates a cul-de-sac as to privately-owned property. *Boskovich v. Midvale City Corp.*, 243 P.2d 435 (1952).

Defendants admit that the District Court summarily dismissed Plaintiffs' claim for relief under the private attorney general doctrine in the very initial stage of the lawsuit "without being moved by [Defendants]." (DAB at 13).

Defendants purport to justify the District Court's action by saying that the District Court's subsequent summary denial of Plaintiffs' Motion to Reconsider, without notice and without hearing, somehow constituted notice and opportunity to be heard, even though the only hearing other than the initial TRO hearing that was ever held was Defendants' Contempt Hearing, noticed only as such.[17]

The law in this regard, cited in Plaintiffs' Initial Brief at 18-19, is unambiguous. The *sua sponte* dismissal of Plaintiffs' claim for fees under the private attorney general doctrine amounts to gross abuse and a violation of Plaintiffs' due process rights. Defendants cite no law to contrary, nor in deed can they.

B. Defendants Entirely Ignore And Misstate Material Facts To Bolster Their Proposition That Plaintiffs Did Not Receive A Judgment Or Relief On The Merits

The mental gymnastics Defendants engage in to bolster their proposition that Plaintiffs received absolutely no relief on the merits is simply pitiful!

Plaintiffs' Application for Temporary Restraining Order sought to enjoin Defendants from taking action in furtherance of their unlawful Plan Amendment. The District Court's Order and Stipulation regarding Plaintiffs' Application for Temporary Restraining Order (**Exhibit A**) enjoins Defendants from "taking any

action in their official capacities as Mayor or members of the West Jordan City Council to cause the City to: a) sell, lease, encumber or rezone the [Sugar Factory Property], or b) enter into any binding contracts that would commit the City to sell, lease, encumber or rezone affecting the Property, c) *will not award any contract for actions* pursuant to RFP regarding the Sugar Factory Property."

If there were no Order or relief on the merits of any kind in Plaintiffs' favor, as Defendants misrepresent to this Court, why in the world did the District Court issue, in response to Plaintiffs' moving papers, an Order To Show Cause Why Defendants Should Not Be Held In Contempt? In contempt of what, if the District Court granted absolutely no relief on the merits in Plaintiffs' favor?

Defendants' efforts to misguide this Court are simply disingenuous and wrong!

Defendants' reliance on *Buchannon Bd. v. West Virginia D.H.H.R.*, 532 U.S. 598 (2001) is inapposite. First, *Buchannon* pertains only to a situation where a party "has failed to secure a judgment on the merits of a court-ordered consent decree." *Id.* at 532. As addressed above, the District Court clearly entered its Order and Stipulation Regarding Plaintiffs' Motion for Temporary Restraining Order enjoining Defendants from "taking any action in furtherance of [Defendants' unlawful] Plan Amendment." (**Exhibit A**). Second, as set forth in *Crank v. Utah Judicial Council*, 2001 UT 9 ¶ 38, 20 P.3d 307, the District Court's Order and Stipulation clearly "legally-mandated modifications of behavior brought

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[17] R. 490-91.

about as a direct result of [Plaintiffs'] suit." Otherwise, why would the District Court have entered an Order to Show Cause why Defendants should not be held in contempt for "taking action in furtherance of the Plan Amendment" in violation of the District Court's Order and Stipulation? Third, both *Buchannon* and *Crank* pertain to civil rights matters, i.e. one individual' or party's claim against a governmental entity for their own pecuniary benefit. In this matter, Plaintiffs sought no "individual pecuniary interest," but rather brought this action to vindicate "strong [and] societally important public policy" interests on behalf the citizens of West Jordan in general. *Stewart v. Pub. Serv. Comm.*, 855 P.2d 759, 789-90 (Utah 1994). The authority cited in Plaintiffs' Initial Brief at 25-31, pertain primarily to cases dealing with private attorney general claims, not civil rights fee claims. The fee-shifting rationale behind these types of cases is quite distinct in many important respects from pure civil rights fee claims as the primary emphasis in the private attorney claim is, as in this matter, the conferral of a general public good and not merely an individual's own pecuniary interest.

C. Defendants Disingenuously Ignore Their Own Official City Council Minutes In Representing To This Court Their Unsupportable Proposition That Plaintiffs' Lawsuit Was Not The "But For" Cause Of Defendants Rescinding Their Unlawful Plan Amendment.

Defendants shamelessly represent to this Court that Plaintiffs' lawsuit was not the "but for" cause of Defendants repealing their unlawful Plan Amendment. Even the most cursory review of Defendants' own City Council Minutes and Request for Action (collectively **Exhibit I**) regarding the rescission of their

unlawful Plan Amendment reveals the depths to which Defendants have stooped, and are willing to stoop, to justify their unlawful conduct.

On the eve of Defendants' Contempt Hearing, the November 13, 2001 Request for Council Action and the City Council Meeting Minutes regarding the repeal of Defendants' unlawful Plan Amendment, state only the following rationale for this action:

> "Kevin Watkins [City Attorney] said on May 1, 2001, the City Council, by Ordinance, amended the City of West Jordan General Plan. *This action was now the subject of a lawsuit filed by members of the Parks Committee, and was now pending in District Court. Repealing this action would eliminate the need for further litigation about this issue by rendering it moot.*" (emphasis added).

For Defendants now to deliberately misrepresent to this Court that Plaintiffs' lawsuit was not the "but for" cause of repealing Defendants' unlawful Plan Amendment is worthy of Rule 11 sanctions.

D. **Defendants' Assertion That It Is Not A Matter Of Important Public Policy To Enjoin Defendants' From Taking Actions In Furtherance Of Disposing Public Parklands For A Private Commercial Development Through Various Unlawful Means Under The Guise Of Official "City" Action Is Patently Absurd.**

As pointed out by Defendants, the *Woodland Hills* court did understandably state that not "*every*" violation of municipal statute merits attorney's fees under the private attorney general doctrine. *Woodland Hills Residents Assoc., Inc. et. al. v. City Council of Los Angeles*, 593 P.2d 200, 203 (Cal. 1979) However, what Defendants fail to point out is that the very statutory violation at issue in *Woodland Hills*, for which attorney's fees were awarded under the private attorney

general doctrine, was a city council's violation of its own land use statutes with respect to the unlawful changing of that city's general plan in approving a subdivision plan without following their own Development Code.[18]

Plaintiffs concede that not "*every*" inconsequential violation of a municipal statute should give rise to a right to recover fees under the private attorney general doctrine. Hence, the requirement enunciated in Stewart that the violation be a matter of "strong or societally important public policy." *Stewart* at 789-90.

In this case, Defendants did not violate just one single, inconsequential municipal statute. Rather, Defendants entirely disregarded whatever laws or order of the District Court stood in the way of their efforts to dispose of West Jordan public parklands for a private commercial development. A summary of Defendants' multiple violations of law follows:

a. Failure and refusal to notice public hearing on the recommendation forwarded by the Planning Commission -- WJUDC 10-1-201(e) and UCA 10-9-303;
b. Failure and refusal to hold a public hearing on the recommendation forwarded by the Planning Commission -- WJUDC 10-1-201(e) and UCA 10-9-303;
c. Entertaining approval of Defendants' DAT Plan Amendment despite having specific knowledge that it did not satisfy mandatory requirements for an amendment to the general plan – WJUDC 10-1-201(g);
d. Approving Defendants' DAT Plan general plan amendment despite knowing that it was legally deficient -- WJUDC 10-1-201(g);
e. Forcibly removing the representative of the Parks and Rec Committee from the public hearing, and from City Hall entirely, without any motion or vote of the Council. Counsel for Plaintiffs simply refused to yield the podium without an explanation why

[18] *Woodland Hills Residents Assoc. v. City Council of Los Angeles, et al.*, 23 Cal.3d 917, 926, 593 P.2d 200 (Cal. 1979).

Defendants refused to follow the various laws which required a public hearing of the Parks and Rec Plan, unanimously approved and forwarded by the Planning Commission – UCA 10-3-608;

f. Approving a contract for the commercial development design of the Sugar Factory park property in violation of the City's own Procurement Ordinance – West Jordan Municipal Code 2-7-102; and

g. Awarding and executing a contract for the commercial development design of the Sugar Factory park property in violation of the District Court's Order that Defendants "will not award any contract for actions" regarding the Sugar Factory Property in furtherance of Defendants' unlawful Plan Amendment – **Exhibits A and H.**

Certainly, a single, isolated violation of an inconsequential municipal statute should not give rise to an award of fees under the private attorney general doctrine. That just simply is not the case in this matter! Defendants have violated the public trust and run roughshod over every law, order, and policy that stood in their way. Hence, the need for Plaintiffs to have commenced removal proceedings against Defendants in connection with this action.

The mere fact that 68% of the citizens of West Jordan (DAB at 22) eventually voted to protect West Jordan's Main City park property, including the Sugar Factory Property at issue, dispels any question that Plaintiffs' action to prevent Defendants from taking action in furtherance of disposing public parklands in disregard of the laws and statutes of the state of Utah and the City of West Jordan pending such vote, is a matter of important public policy. Moreover, dissenting City Councilmembers Natalie Argyle, Gordon Haight and Brian Pitts and Parks and Rec Committee officers and members Robert Shipman, Dale Sweat and Kathleen Rollman all provided sworn statements that enjoining Defendants

from unlawfully changing West Jordan's General Plan in furtherance of their efforts to dispose of public parklands was a matter of important public policy.[19]

That Defendants even dispute that this matter is of great public importance reveals just how far out of touch they really are! Although Plaintiffs were never given the opportunity to any adduce evidence in this case, a recent survey conducted by the City of West Jordan revealed that 88% of West Jordan respondents considered the preservation of parks and open space the number one priority for the City.

Defendants offer no facts and no authority that this matter is not one of important public policy. Defendants reliance on *Springville Citizens for a Better Community v. City of Springville*, 979 P.2d 332 (Utah 1999) for the proposition that city's "failure to pass the legality requirements of section 10-9-1001(3)(b), however, does not automatically entitle Plaintiffs to the relief they request" makes no sense in this context, particularly in light of this Court's recent decision in *Toone, et. al. v. Weber County, et. al.*, 2002 UT 103 (2002).

The issues in *Toone* bear great similarity to some of the issues in the present case. In *Toone*, this Court held that the Weber County's failure to provide notice and public hearing prior to changing the general plan use of and selling recreational land was a violation of the County Land Use Development and Management Act (CLUDMA) and was not a "land use decision" subject to the review procedures of UCA 17-27-1001. *Id.* at ¶ 8-9. The UCA 10-9-1001 *et seq.*

[19] Addenda **Exhibits J, K, L at para. 31, and O, P, Q at para 25.**

is virtually identical in all material respects to UCA 17-27-1001 with respect to changes to a city's general plan and review of such decisions.

Accordingly, this Court stated in *Toone* that a governmental body in taking action which changes the general plan "***must follow*** the procedural requirements . . . and *its ordinances* ***must comport*** therewith." *Id.* at ¶ 14 (emphasis added). For Defendants to propose that ignoring mandatory procedural requirements in changing the use of public parklands to make way for a private commercial development is insignificant and not a matter of "strong [and] societally important public policy" flies in the face of this Court's holding in *Toone*.

II. PLAINTIFFS' CLAIMS FOR DECLARATORY RELIEF WERE NOT MOOT WHEN DISMISSED BY THE DISTRICT COURT, NOR ARE THEY NOW MOOT OR UNFOUNDED.

Defendants pose the nonsensical argument that the District Court did not err in *initially* summarily dismissing Plaintiffs' claims for declaratory relief because the District Court *subsequently* determined at Defendants' November 28, 2001 Contempt Hearing, without notice and opportunity to be heard, that Plaintiffs' remaining undismissed claims were moot. (Defendants' Brief at 23),

Not only was the initial summary dismissal clear error then, there remains a justiciable controversy. However, because Plaintiffs were never given the opportunity to conduct discovery, such evidence is not in the record below. However, it is a matter of public record with the City of West Jordan that in or about March of 2002, the West Jordan City Council approved a previously pending plan to dispose of a part of the Sugar Factory Property (which they

"deemed" was outside the area covered by the Citizens' Initiative but which was purchased for, zoned, and master planned as recreational/park property) for a private, low-income senior housing development. (**Exhibit T,** attached hereto). In doing this, the City Council made no effort to vacate the park use of this property by public hearing as required under UCA 10-8-8 or to appropriately comport with the statutory requirements for changing the "use" of such public property. Had they noticed a hearing to vacate the public use of this property, citizens would have had an opportunity to know and be heard on the matter.

In fact, the contract with the private developer was awarded for the low-income senior housing development even before the City Council had changed the zoning for this property from the park/recreational use. (**Exhibit T**). However, they never provided notice or a public hearing to vacate the park use of this property or apprise citizens of their intent to change the public use of this property in derogation of the public trust pursuant to which this property was purchased and held.[20]

III. REMOVAL IS A "CIVIL ACTION" WHICH A TAXPAYER MAY COMMENCE AND PURSUE.

As noted by Defendants, Plaintiffs concede that on remand Plaintiffs' claims for the removal of Defendants from office should be properly presented to the presiding judge of the district court. The change of venue required under UCA

[20] *McDonald v. Price*, 146 P. 550, 551 (Utah 1915)(public park property "*is held in trust strictly* for corporate purposes and, as a general rule, cannot be sold or

77-6-4(1)(b) does not warrant the summary dismissal of Plaintiffs claims in light of the affidavits and evidence of wrongdoing by Defendants, which Plaintiffs presented to the District Court. Defendants provide no authority to suggest that the matter was properly dismissed rather than merely transferred to the presiding judge of the district court.

Moreover, the authority cited in Plaintiffs' Initial Brief at 35-37 clearly establishes that "the better reasoned cases hold that [removal actions of public officials] are civil" and that "the rights of the parties and procedures used shall be the same as in any civil proceeding" governed by the "rules of civil procedures." Consequently, on remand to the presiding judge of the district court. Plaintiffs request that this Court declare that Plaintiffs may pursue their "civil action" against Defendants under the rules of civil procedure for their removal from office. And, in the case of Donna Evans, already resoundingly voted out of office, that she not be able to hold future office under UCA 10-3-826.

IV. PLAINTIFFS' FIRST AND SECOND CAUSES ARE NOT MOOT BECAUSE CITY STILL DISPOSING OF PUBLIC PARKLAND WITHOUT NOTICE AND HEARING TO VACATE PARK USE.

As addressed above in Paragraph 8 of Defendants' Material Misstatements of Fact, the West Jordan City Council in or about March of 2002 approved previously pending plans for the disposition of Sugar Factory park land for a low-income senior housing development, without vacating the park use of the property,

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disposed of so long as it is being used for the purposes for which it was acquired.")(emphasis added).

without first changing the general plan (which provided for recreational/park use) and without first changing the zoning (which provided for recreational/park use). (**Exhibit T**). However, Plaintiffs were never afforded the opportunity to conduct discovery regarding the pending nature of such plans in order to be able to present this information to the District Court before it summarily dismissed the balance of Plaintiffs' claims during the hearing which was noticed only for Defendants' Contempt Hearing.[21]

V. THE DISTRICT COURT'S ORDER TO SHOW CAUSE "CLEARLY FLOWED FROM PLAINTIFF'S MOTION", DID NOT FOLLOW THE SPECIFIC PROCEDURES FOR CRIMINAL CONTEMPT, AND, THEREFORE, WAS A CIVIL CONTEMPT MATTER.

Defendants' conduct in moving to award and awarding contracts in violation of the District Court's Order and Stipulation enjoining Defendants from taking action in furtherance of their unlawful Plan Amendment did not occur in the presence of the District Court. In fact, "but for" Plaintiffs' Renewed Motion for Preliminary Injunction (which concededly should have been styled as a Motion for Order to Show Cause and which the District treated as such), the District Court obviously would never have been aware of Defendants' conduct in "derogation of the stipulation." (R. 789-90).

The District Court itself admitted at the Contempt Hearing that its Order to Show Cause "clearly flowed from plaintiffs' arguments and repeated motions to

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[21] As noted in *Robinson v. City Court for City of Ogden,* 185 P.2d, 256, 258 (Utah 1947), "A contempt proceeding is separate and apart from the principle action." It

have the Court consider actions subsequent to the May hearing that this Court held." (R. 801 at 43-44). However, despite acknowledging that it was on Plaintiffs' motion that Defendants were before the District Court to show why they should not be held in contempt for violating the District Court's Order and Stipulation enjoining Defendants from acting in furtherance of their unlawful Plan Amendment, the court erroneously held that "*regardless of who is exactly prosecuting this [contempt matter]*, I think that" the standard is beyond a reasonable doubt. (R. 801 at 44)(emphasis added).

Well, no, it is not "*regardless* of who is prosecuting" the contempt action that is the standard beyond reasonable doubt. As Defendants themselves point out, *Von Hake v. Thomas*, 759 P.2d 1162, 1172 (Utah 1988) plainly establishes that only a clear and convincing standard is required for civil contempt. That this truly was a civil matter and not a criminal contempt proceeding is evidenced by the fact that a criminal contempt proceeding requires all the procedural safeguards mandated under Article I Section 12 of the Utah Constitution; none of which were applied in this matter.[22]

The District Court acknowledged that it was on Plaintiffs' motions that the Order to Show Cause was issued. And, the District Court's Order and Stipulation

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was plain error for the District to entertain and decide oral motions without notice and an opportunity for Plaintiffs to be adequately heard on such matters.

[22] Such constitutional safeguards include the acknowledgment of a right to counsel, to demand the nature or cause of the criminal accusation, to have a speedy trial by an impartial jury, in short, a criminal contempt proceeding must be an independent

enjoining Defendants from taking any actions in furtherance of their unlawful Plan Amendment was in response to Plaintiffs' application for a temporary restraining order against Defendants. And, it was Plaintiffs' who bore the cost of presenting the matters to the District Court and who lost the protection of the District Court's Order as a result of Defendants' contempt thereof. Consequently, this was a purely civil contempt matter to be considered under clear and convincing standard of proof.

In this regard, the District Court expressly "determined that Defendants' actions appear to skirt the terms of the stipulation" and the District Court also "warned Defendants against *further actions in derogation of the stipulation*." (R. 789-90). Consequently, it was clear to the District Court that Defendants' actions "skirt[ed] the terms of the stipulation" and that Defendant had taken past actions in "derogation of the stipulation" because the District warned Defendants against "*further actions in derogation of the stipulation*." Id.

However, the District Court stopped short of holding the Defendants in contempt merely because the court relied upon the wrong standard of proof -- beyond reasonable doubt. As set forth in Plaintiffs' Initial Brief at 40-48, Defendants' conduct in "derogation of the stipulation" clearly satisfies the elements of civil contempt such that this Court can enter a finding of contempt and award fees and costs to Plaintiff. In the alternative, this matter should be

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criminal action. *Robinson v. City Court for City of Ogden,* 185 P.2d 256, 258 (Utah 1947).

remanded for a full evidentiary hearing applying the civil "clear and convincing" standard of proof.

Defendants' final point is that, even if Defendants' did "skirt the terms of the stipulation" in "derogation of the stipulation," "Plaintiffs' suffered no injury." (DAB at 32).

It takes no large degree of common sense to comprehend that there is a tremendous burden and cost to "fighting City Hall;" in this case, a few renegade public officials that hold voting control of the City Council. Plaintiffs will gladly provide appropriate affidavits of the exact amount of fees and costs incurred by Plaintiffs to seek redress for Defendants' "derogation of the stipulation."

CONCLUSION

There are sufficient facts in the record for this court to rule in favor of Plaintiffs' private attorney general claim and for finding Defendants in contempt of court.

The remaining matters should be remanded for proceedings consistent with Plaintiffs' due process rights on Plaintiffs' claims for declaratory relief concerning the disposition of West Jordan's Main City Park property for private commercial development and on Plaintiffs' action for the removal of Defendants from office.

RESPECTFULLY SUBMITTED this 25th day of November, 2002

By: Kenneth R. Ivory
Attorney for Appellants

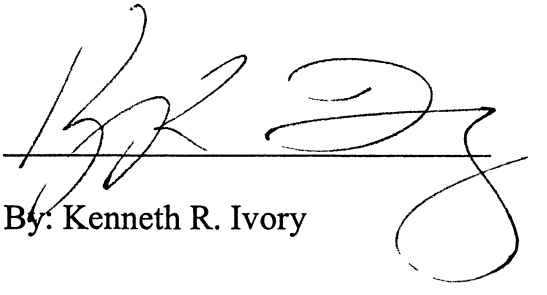
CERTIFICATE OF SERVICE

I certify that on November 25, 2002 I caused to be served by hand delivery the foregoing REPLY OF APPELLANTS to the following:

One (1) original and (9) true and correct copies to the Supreme Court of the State of Utah at 450 South State Street, Salt Lake City, UT 84111; and

Two (2) true and correct copies to Counsel for the Appellees, W. Cullen Battle, Esq. and J. David Pearce, Esq. at the Law Offices of Fabian & Clendenin, 215 South State, Twelfth Floor, Salt Lake City, UT 84110.

KENNETH R. IVORY, P.C.



By: Kenneth R. Ivory

EXHIBIT “T”

Councilmember Allison	**Yes**
Councilmember Argyle	**Yes**
Councilmember Hilton	**Yes**
Councilmember Nelson	**Yes**
Councilmember Richardson	**Yes**
Councilmember Summers	**Yes**
Mayor Holladay	**Yes**

The motion passed 7-0.

Councilmember Allison said the number one reason why governments existed was to protect the citizens. He felt Public Safety was the reason for "being." He was shocked to hear the security issues. He said the Council needed to take action.

Gary Luebbers said in the past, decisions were made in a vacuum, without any concerns about the implications for the decisions. Projects had been approved without concern of the infrastructure, and personnel that would service the projects. He felt it was his responsibility to bring the important issues to the Council.

Councilmember Allison said the Council hired the City Manager to keep the Council out of trouble. He commended Gary Luebbers and his staff for doing their job. He asked Gary Luebbers to be aggressive to help the Council see the solution, as well as help bring the problems to the attention of the Council. The Council had to make the decisions, and therefore, needed the information, tools, options, and consequences of all alternatives. He asked for a plan in place.

Gary Luebbers said the problems had been presented. During the Budget, they would see a menu of solutions, and then it would be up to the Council to make the decisions.

AWARD THE SELECTION FOR THE DEVELOPMENT OF AFFORDABLE HOUSING FOR SENIOR CITIZENS AND DISABLED PERSONS ON THE CITY PROPERTY LOCATED AT THE SOUTHEAST CORNER OF SUGAR FACTORY ROAD AND 2200 WEST CONTINGENT UPON A REZONE OF THE PROPERTY

Tom Burdett said the City of West Jordan issued Request for Proposals (RFP) for the development of Affordable Housing for Senior Citizens and Disabled Persons on December 7, 2001. The purpose of the RFP was to identify and select a qualified, experienced group or consortium of firms who would design, construct, manage, and own a special needs housing facility 66 one-bedroom housing units. The Development would serve senior and disabled persons with incomes ranging from 30-50% of the area median income (less than $1,100.00 per month income). In addition, the Development would include a one-acre park that would also serve the disabled, as part of the overall development.

This Development was to be located on 4.25 acres of vacant land located between Sugar

Factory Road, Bingham Creek and 2200 West. This property was owned by the City of West Jordan and was currently vacant land.

The City of West of Jordan received two responses from the Request for Proposals to develop this facility. Detailed and qualified proposals were received from Utah Non Profit Housing Corporation and IDEPHA. Both proposals addressed all issues identified in the RFP and each developer presented an extensive background in the development of Senior and Disabled Housing. The Review Team reviewed the proposals submitted and was making a recommendation to the City Council. The Team consisted of representatives from the City Manager's Office, Finance Department, Community Development Department, Economic Development, CDBG Program, and Council. Both Developers made presentations to the Committee on Wednesday, March 13, 2002, and various Committee Members visited the most recent project constructed and managed by both Developers.

While the Team found both proposals to be responsive and qualified, they felt that Utah Non Profit Housing Corporation would better address the need identified in the RFP for the following reasons:

- Utah Non Profit Housing Corporation had an extensive background in working with the Department of Housing & Urban Development Section 202 & 811 Housing Programs. Utilization of these programs was strongly encouraged in the RFP for the development of special needs housing. These programs allowed for the development of quality housing units with a rent level below 30% of the median income limits. IDEPHA proposed using only Tax Credits for the development of the units.
- Utah Non Profit Housing Corporation took no exception to any part of the RFP. IDEPHA took exception to the development of a 2-storied structure and felt that a minimum 2 ½-storied structures would be necessary to make the project feasible for an elevator. In addition, IDEPHA felt that the level of development (66 units) could be too small for feasible development and felt that the density should be increased from the proposed R-3-22.
- Utah Non Profit Housing Corporation identified and committed $80,000 toward the construction of the one-acre park in their proposal. IDEPHA identified the Park but made no commitment of funds to Park Development.

Councilmember Hilton was concerned this proposal was premature, before the property was rezoned.

Tom Burdett said they would like to start on the applications with HUD, because they were due May 1, 2002. He said they would also like to have other neighborhood meetings with the housing provider.

Gary Luebbers stressed the approval was contingent upon the rezone of the property. The Planning and Zoning Commission held a Public Hearing, and forwarded a positive

recommendation for the rezone. He said there were not any public comments against the rezone at that meeting.

MOTION: Councilmember Summers moved that we select Utah NonProfit Corporation for the Development of Affordable Housing for Senior Citizens and Disabled Persons on the current City property located at the southeast corner of Sugar Factory Road and 2200 West, contingent upon rezone of the property. The motion was seconded by Councilmember Allison.

Councilmember Hilton asked for clarification on the 4.25 acres described as Park area?

Tom Burdett affirmed that it did include the Park. He said 1¼ of the acreage would be a manicured Park, and the two acres would be Open Space and Trail. The 4.25 acres would have some assistance with development of the Park facility by Utah NonProfit Corporation.

Councilmember Hilton asked what was the amount of space that would be developed into parking?

Tom Burdett did not believe there would be much space taken up for parking.

Chuck Tarver addressed the acreage for the Park area and developed area. He said the parking at the Senior Housing Facility would be in conjunction with the Park. The parking would end up being on the three acres of the Senior Housing site, leaving the Park approximately 1.25 acres. He indicated the proposal was for a "walk-to" Park, and not a "drive-to" Park.

A roll call vote was taken

Councilmember Allison	**Yes**
Councilmember Argyle	**No**
Councilmember Hilton	**Yes**
Councilmember Nelson	**Yes**
Councilmember Richardson	**No**
Councilmember Summers	**Yes**
Mayor Holladay	**Yes**

The motion passed 5-2.